3.1 Unseaworthiness

In order to prevail on [his/her] unseaworthiness claim, [plaintiff] must establish each of the following things by a preponderance of the evidence:

> First, that [he/she] was a seaman on [defendant]'s vessel;
>
> Second, that [the vessel] was unseaworthy; and
>
> Third, that its unseaworthy condition was a legal cause of the injury sustained by [plaintiff].

[Add definitions from Jones Act instruction regarding "seaman" and "vessel in navigation" as appropriate.]

A claim of "unseaworthiness" is a claim that the owner of [the vessel] did not fulfill [his/her/its] legal duty to members of the crew to provide a vessel reasonably fit for its intended purpose. The owner's duty under the law to provide a seaworthy ship is absolute. The owner may not delegate the duty to anyone. If the owner did not provide a seaworthy vessel, then no amount of due care or prudence excuses it, whether [he/she/it] knew or could have known of the deficiency.

If, therefore, you find that [the vessel] was not reasonably fit for its intended purpose, and that such condition was a legal cause of the injury to [plaintiff], then you may find that [the vessel] was unseaworthy and [defendant] liable, without any reference to the issue of negligence of [defendant] or any of [his/her/its] employees.

The vessel owner's duty includes maintaining the vessel and her equipment in a proper operating condition and can be breached by either temporary or permanent defects in the equipment. The owner of the vessel is not required, however, to furnish an accident-free vessel or one that will weather every peril of the sea. Instead, the vessel must be reasonably suitable for its intended purpose. A vessel is not called on to have the best appliances or equipment or the finest of crews, but only such gear as is reasonably proper and suitable for its intended use, and a crew that is reasonably competent and adequate.

An unseaworthy condition is a "legal" cause of injury only if it directly and in natural and continuous sequence produces, and contributes substantially to producing such injury, so that it can reasonably be said that, except for the unseaworthy condition, the loss, injury or damage would not have occurred. **[**Unlike the Jones Act claim, with respect to which [plaintiff] may recover if the alleged negligence is proved to be a slight cause of the injury sustained, in order to recover on a claim of unseaworthiness [plaintiff] must prove that the unseaworthy condition was a substantial cause of [plaintiff]'s injury.] Unseaworthiness may be a legal cause of injury even though it operates in combination with the act of another, some natural cause or some other cause if the unseaworthiness contributes substantially to producing such injury.

If a preponderance of the evidence does not support [plaintiff]'s claim that unseaworthiness legally caused [his/her] injury, then your verdict will be for [defendant]. If, however, a preponderance of the evidence does support [plaintiff]'s claim, you will then consider the defense raised by [defendant].

[Defendant] contends that [plaintiff] was negligent and that such negligence was a legal cause of [his/her] injury. This is a defensive claim and the burden of proving this claim, by a preponderance of the evidence, is upon [defendant] who must establish:

First, that [plaintiff] was negligent; and

Second, that such negligence was a legal cause of [plaintiff]'s damages.

"Negligence" is the failure to use reasonable care. Reasonable care is that degree of care that a reasonably careful person would use under similar circumstances to prevent reasonably foreseeable harm. To find negligence, you must find that harm was reasonably foreseeable. Negligence may consist either in doing something that a reasonably careful person would not do under similar circumstances, or in failing to do something that a reasonably careful person would do under similar circumstances.

If you find in favor of [defendant] on this defense, that will not prevent recovery by [plaintiff]. It only reduces the amount of [plaintiff]'s recovery. In other words, if you find that the accident was due partly to the fault of [plaintiff]—that [his/her] own negligence was, for example, 10% responsible for [his/her] injury—then you will fill in that percentage as your finding on the special verdict form I will explain in a moment. I will then reduce [plaintiff]'s total damages by the percentage that you insert. Of course, by using the number 10% as an example, I do not mean to suggest to you any specific figure. If you find that [plaintiff] was negligent, you might find any amount from 1% to 99%.

DAMAGES

I am now going to instruct you on damages in the event you should reach that issue. The fact that I instruct you on damages does not indicate any view by me that you should or should not find for [plaintiff] on liability.

[Plaintiff] bears the burden of proof to show both the existence and the amount of [his/her] damages by a preponderance of the evidence. But this does not mean that [he/she] must prove the precise amount of [his/her] damages to a mathematical certainty. What it means is that [he/she] must satisfy you as to the amount of damages that is fair, just and reasonable under all the circumstances. Damages must not be enlarged so as to constitute either a gift or a windfall to [plaintiff] or a punishment or penalty to [defendant]. The only purpose of damages is to award reasonable compensation. You must not award speculative damages, that is, damages for future losses that, although they may be possible, are wholly remote or conjectural. If you should award damages, they will not be subject to federal or state income taxes, and you should therefore not consider such taxes in determining the amount of damages.

It is the duty of one who is injured to exercise reasonable care to reduce or mitigate the damages resulting from the injury—in other words, to take such steps as are reasonable and prudent to alleviate the injury or to seek out or take advantage of a business or employment opportunity that was reasonably available to [him/her] under all the circumstances shown by the evidence. On this issue of mitigation the burden of proof is on [defendant] to show by a preponderance of the evidence that [plaintiff] has failed to mitigate damages. You shall not award any damages to [plaintiff] that you find [he/she] could reasonably have avoided.

[If you find that [plaintiff] had a pre-existing condition that made [him/her] more susceptible to injury than a person in good health, [defendant] is responsible for the injuries suffered by [plaintiff] as a result of [defendant]'s negligence even if those injuries are greater than a person in good health would have suffered under the same circumstances.]

[[Defendant] is not liable for [plaintiff]'s pain or impairment caused by a pre-existing condition. But if you find that [defendant] negligently caused further injury or aggravation to a pre-existing condition, [plaintiff] is entitled to compensation for that further injury or aggravation. If you cannot separate the pain or disability caused by the pre-existing condition from that caused by [defendant]'s negligence, then [defendant] is liable for all [plaintiff]'s injuries.]

The elements of damage may include:

1. Reasonable Medical Expenses. The parties have stipulated that reasonable medical expenses amount to $_____.

2. Lost Wages and Earning Power. You may award [plaintiff] a sum to compensate [him/her] for income that [he/she] has lost, plus a sum to compensate [him/her] for any loss of earning power that you find from the evidence [he/she] will probably suffer in the future, as a result of [the vessel]'s unseaworthiness.

In determining the amount of future loss, you should compare what [plaintiff]'s health, physical ability and earning power were before the accident with what they are now; the nature and severity of [his/her] injuries; the expected duration of [his/her] injuries; and the extent to which [his/her] condition may improve or deteriorate in the future. The objective is to determine the injuries' effect, if any, on future earning capacity, and the present value of any loss of future earning power that you find [plaintiff] will probably suffer in the future. In that connection, you should consider [plaintiff]'s work life expectancy, taking into account [his/her] occupation, [his/her] habits, [his/her] past health record, [his/her] state of health at the time of the accident and [his/her] employment history. Work life expectancy is that period of time that you expect [plaintiff] would have continued to work, given [his/her] age, health, occupation and education.

If you should find that the evidence establishes a reasonable likelihood of a loss of future earnings, you will then have to reduce this amount, whatever it may be, to its present worth. The reason for this is that a sum of money that is received today is worth more than the same money paid out in installments over a period of time since a lump sum today, such as any amount you might award in your verdict, can be invested and earn interest in the years ahead.

[You have heard testimony concerning the likelihood of future inflation and what rate of interest any lump sum could return. In determining the present lump sum value of any future earnings you conclude [plaintiff] has lost, you should consider only a rate of interest based on the best and safest investments, not the general stock market, and you may set off against it a reasonable rate of inflation.**]**

3. Pain and Suffering and Mental Anguish. You may award a sum to compensate [plaintiff] reasonably for any pain, suffering, mental anguish and loss of enjoyment of life that you find [the vessel]'s unseaworthiness has caused [him/her] to suffer and will probably cause [him/her] to suffer in the future. Even though it is obviously difficult to establish a standard of measurement for these damages, that difficulty is not grounds for denying a recovery on this element of damages. You must, therefore, make the best and most reasonable estimate you can, not from a personal point of view, but from a fair and impartial point of view, attempting to come to a conclusion that will be fair and just to all of the parties.

[4. Interest on Past Losses.]

Comment

(1) The owner of the vessel is liable for unseaworthiness. Cerqueira v. Cerqueira, 828 F.2d 863, 865 (1st Cir. 1987); Rodriguez v. McAllister Brothers, Inc., 736 F.2d 813, 815 (1st Cir. 1984). In addition, "an owner *pro hac vice* may be liable for the unseaworthiness of a vessel. In general, if there is an owner *pro hac vice*, the title owner will be absolved of personal liability (except for defective conditions that existed before the owner *pro hac vice* took control of the vessel). Admiralty cases have recognized only two types of owners *pro hac vice*: demise, or bareboat, charterers and captains of fishing vessels operated under agreements, called 'lays.'" McAleer v. Smith, 57 F.3d 109, 112 (1st Cir. 1995) (citations omitted); see also Brophy v. Lavigne, 801 F.2d 521, 523-24 (1st Cir. 1986) (demise charter). Masters are not owners *pro hac vice*. McAleer, 57 F.3d at 113.

(2) Unseaworthiness is distinct from Jones Act negligence. Supreme Court decisions

> have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care. . . . What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence. . . . What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service.

Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549-50 (1960). "We have consistently held that liability under the doctrine of unseaworthiness is not dependent upon theories of negligence." Ferrara v. A. & V. Fishing, Inc., 99 F.3d 449, 452 (1st Cir. 1996). The definition of "unseaworthiness" here is taken largely from Ferrara and cases cited in that opinion. "Even a temporary and unforeseeable malfunction or failure of a piece of equipment under proper and expected use is sufficient to establish a claim of damages for unseaworthiness, provided the unseaworthy condition is the proximate cause of the harm suffered by the seaman." Hubbard v. Faros Fisheries, Inc., 626 F.2d 196, 199 (1st Cir. 1980) (citations omitted). However, "a random bit of negligence—what the Court has called an 'isolated, personal negligent act,'—is not the stuff of which unseaworthiness is fashioned." Clauson v. Smith, 823 F.2d 660, 665 (1st Cir. 1987) (citation omitted). (This exception for "random negligence" covers crew error, not actual equipment failure. Usner v. Luckenback Overseas Corp., 400 U.S. 494, 499-500 (1971); Clauson, 823 F.2d at 665.) "The mere happening of an accident does not in itself establish unseaworthiness." Logan v. Empresa Lineas Maritimas Argentinas, 353 F.2d 373, 377 (1st Cir. 1965).

Foreseeability is not an element of unseaworthiness. The duty to provide a seaworthy vessel is absolute: "[e]ven a temporary and unforeseeable malfunction or failure of a piece of equipment under proper and expected use is sufficient to establish a claim for damages for unseaworthiness." Hubbard, 626 F.2d at 199; see also Morton v. Berman Enterprises, Inc., 669 F.2d 89, 92-93 (2d Cir. 1982). Nevertheless, the comparative fault defense is a negligence claim and negligence requires foreseeability. See Jones Act Instruction cmt. 10. Therefore, foreseeability language appears in the comparative negligence portion of the instruction. (The Sixth Circuit has included a foreseeability component in its definition of causation, see Szymanski v. Columbia Trans. Co., 107 F.3d 371, 378 (6th Cir. 1997), but the First Circuit has not used such language.)

(3) Only a seaman may bring a claim for unseaworthiness. The Osceola, 189 U.S. 158, 175 (1903). The First Circuit has not explicitly determined whether unseaworthiness is available to laborers other than Jones Act "seamen." In Seas Shipping Co., Inc. v. Sieracki, the Supreme Court used the term expansively for an unseaworthiness cause of action. 328 U.S. 85, 99-101 (1946) (longshoreman injured while loading cargo aboard a vessel was "a seaman because he [was] doing a seaman's work and incurring a seaman's hazard"). It did the same in Pope & Talbot, Inc. v. Hawn. 346 U.S. 406, 412-14 (1953) (independent contractor injured aboard while conducting repair). But Congress amended the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 905(b) (1994), to divest longshoremen covered by the LHWCA of the right to an unseaworthiness claim. Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 208 n.6 (1996). Other Circuits differ on whether there remain any "Sieracki seamen" with the right to bring an unseaworthiness claim. Yoash v. McLean Contracting Co, Inc., 907 F.2d 1481, 1487 (4th Cir. 1990) (implicitly recognizing the viability of the right by utilizing the Sieracki definition of "seaman"); Normile v. Maritime Co. of the Philippines, 643 F.2d 1380, 1381-83 (9th Cir. 1981) (abolishing the right for all "Sieracki seamen"); Aparicio v. Swan Lake, 643 F.2d 1109, 1116 (5th Cir. Unit A Apr. 1981) (preserving the right for all "Sieracki seamen" not covered by the LHWCA); Simko v. C & C Marine Maintenance Co., 594 F.2d 960, 960 n.1 (3d Cir. 1979) (abolishing the right for "longshoremen" but not explicitly barring claims by Sieracki seamen not covered by the LHWCA); Capotorto v. Compania Sud Americana De Vapores, 541 F.2d 985, 988 n.3 (2d Cir. 1976) (same). The First Circuit has not taken a position.

Moreover, the damages available to a Sieracki plaintiff after Miles v. Apex Marine Corp., 498 U.S. 19 (1990), are unclear.

(4) A claim of unseaworthiness can be based on the assault of a crewman by another. The Supreme Court said that there is "no reason to draw a line between the ship and the gear on the one hand and the ship's personnel on the other." Boudin v. Lykes Bros. S.S. Co., Inc., 348 U.S. 336, 340 (1955). The jury will measure the assailant seaman's proclivity for assault to determine if the seaman was "equal in disposition and seamanship to the ordinary [person] in the calling." Connolly v. Farrell Lines, Inc., 268 F.2d 653, 655-56 (1st Cir. 1959).

(5) If "perils of the sea" is a defense, the following additional language from Ferrara might be considered:

> [T]he perils of the sea doctrine excuses the owner/operator from liability when "those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence" intervene to cause the damage or injury.

99 F.3d at 454 (quoting R.T. Jones Lumber Co., Inc. v. Roen S.S. Co., 270 F.2d 456, 458 (2d Cir. 1959)). According to Ferrara, "a peril of the sea is an unforeseeable situation" and its determination "'is wholly dependent on the facts of each case and is not amenable to a general standard.'" Id. (quoting Thyssen, Inc. v. S/S Eurounity, 21 F.3d 533, 539 (2d Cir. 1994)).

(6) "Unlike at common law, in both Jones Act and unseaworthiness actions, neither assumption of risk nor contributory negligence are available as complete defenses to liability. Instead, the admiralty doctrine of comparative negligence applies." Wilson v. Maritime Overseas Corp., 150 F.3d 1, 11 (1st Cir. 1998) (citations omitted).

(7) Both of the defenses discussed in Peymann v. Perini Corp., 507 F.2d 1318 (1st Cir. 1974), are applicable to unseaworthiness claims. See Jones Act Instruction, cmts. 8, 9.

(8) The standard of causation remains problematic. Although Hubbard spoke of a "direct and substantial cause," it also said: "The requisite causation to sustain an unseaworthiness claim . . . is less than that required for a common law negligence action. It is sufficient to sustain the jury's verdict that there was some evidence that the unseaworthy condition . . . was a direct and substantial cause of [plaintiff]'s ultimately disabling injury." 626 F.2d at 201. But in a later case, the First Circuit seems to have treated the causation issue for unseaworthiness as that of "the traditional common law burden of proving proximate cause." Brophy, 801 F.2d at 524. The court said that the "plaintiff must show that the unseaworthy condition of the vessel was the proximate or direct and substantial cause of the seaman's injuries," and that "'the act or omission [is] a cause which in the natural and continuous sequence, unbroken by any efficient intervening cause, produces the results complained of, and without which it would not have occurred.'" Id. (quoting 1B Benedict on Admiralty § 28, at 3-162 (7th ed. 1980)); see also Ferrara, 99 F.3d at 453 ("sole or proximate cause of the injury"). Most recently the court said: "To prevail on a

theory of unseaworthiness, [plaintiff] had to prove that the unseaworthy condition was a direct and substantial cause of his injury." Gifford v. American Canadian Caribbean Line, Inc., 276 F.3d 80, 83 (1st Cir. 2002).

(9) In an unseaworthiness case, prejudgment interest can be awarded for past lost wages, past medical expenses, and past pain and suffering with the start of trial date being the usual cutoff. The jury must decide whether to award such prejudgment interest. Robinson v. Pocahontas, Inc., 477 F.2d 1048, 1053 (1st Cir. 1973). Note that it is unclear what should happen if there is a combined Jones Act/unseaworthiness damage award without an allocation between them, inasmuch as prejudgment interest is not available under the Jones Act. Borges v. Our Lady of the Sea Corp., 935 F.2d 436, 443 n.1 (1st Cir. 1991). It seems best, therefore, to separate the awards. Prejudgment interest cannot be awarded for any future loss of earnings, future medical expenses, and/or future pain and suffering. Id. at 445.

(10) Any award of past or future lost wages should be based upon after-tax earnings, and the jury should be allowed to consider evidence necessary for the calculation. Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490, 493-96 (1980). But unseaworthiness damage awards themselves are not taxable income. 26 U.S.C. § 104(a)(2) (2001); Liepelt, 444 U.S. at 496-98. Section 104(a)(2) excludes from taxation awards for both wage and non-wage income, Allred v. Maersk Line, Ltd., 35 F.3d 139, 142 (4th Cir. 1994), but not prejudgment interest. Rozpard v. Commissioner, 154 F.3d 1, 6 (1st Cir. 1998). Therefore, an instruction that the damage award will not be taxed is required, Liepelt, 444 U.S. at 498, at least if requested. Diefenbach v. Sheridan Transp., 229 F.3d 27, 32 (1st Cir. 2000) (failure to instruct not error if no objection).

(11) Any award of future earnings should be reduced to present value, and the jury must be instructed accordingly. Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485, 491 (1916). The discount rate is determined by the jury. Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330, 341 (1988); see also St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409, 412 (1985) (per curiam) (noting that the discount rate "should take into account inflation and other sources of wage increases as well as the rate of interest"). Notwithstanding inflationary factors, "[t]he discount rate should be based on the rate of interest that would be earned on 'the best and safest investments.'" Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 537 (1983) (quoting Kelly, 241 U.S. at 491). The "best and safest investments" are those which provide a "risk-free stream of future income," not those made by "investors who are willing to accept some risk of default." Pfeifer, 462 U.S. at 537; see also Kelly, 241 U.S. at 490-91; Conde v. Starlight I, Inc., 103 F.3d 210, 216 & n.8 (1st Cir. 1997) (suggesting six percent as an appropriate "market interest rate").

(12) We have found no cases stating that damages resulting from aggravation of a pre-existing injury are or are not recoverable. We have nevertheless included this element of damages in the instruction because it is standard tort doctrine and because various courts have approved its use for Jones Act claims.

(13) Punitive damages and damages for loss of society (parental and spousal) are unavailable, whether the injury is fatal or not. Miles, 498 U.S. at 32-33; Horsley v. Mobil Oil Corp., 15 F.3d 200, 202-03 (1st Cir. 1994).

(14) A wrongful death claim for pecuniary loss can be made under the unseaworthiness doctrine. Miles, 498 U.S. at 32-33; see also Moragne v. States Marine Lines, Inc., 398 U.S. 375, 409 (1970). The Supreme Court has not decided whether there is a general maritime survival right, but has held that any survival right cannot include recovery of earnings beyond the decedent's lifetime. Miles, 498 U.S. at 33-36. Earlier, the First Circuit had said that personal rights of action in tort do survive under maritime law. Barbe v. Drummond, 507 F.2d 794, 799-800 & n.6 (1st Cir. 1974).

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

[PLAINTIFF]	)	
	)	
V.	)	**CIVIL NO. _____**
	)	
[DEFENDANT]	)	

SPECIAL VERDICT FORM
[Unseaworthiness Claim]

1. Do you find that the [vessel] was unseaworthy and that its unseaworthiness was a legal cause of [plaintiff]'s injuries?

   Yes _____ No _____

   If your answer to Question #1 is "yes," proceed to Question #2. Otherwise, answer no further questions.

2. What are the total damages caused by the accident?

   $_____

   Proceed to Question #3.

3. Was the accident caused in part by [plaintiff]'s own negligence?

   Yes _____ No _____

   If your answer to Question #3 is "yes," answer Question #4. Otherwise, answer no further questions.

4. In what percentage did [plaintiff]'s negligence contribute to the accident?

   _____%

Dated: _____, 200_

_____
Jury Foreperson